No. 12668

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

EDWARD HERZINGER,
Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT,
Appellees.

Brief of Appellant

Upon Appeal From the District Court of the United States For the District of Nevada

HON. ROGER T. FOLEY, District Judge

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JURISDICTION

This is an appeal from final judgment of the District Court of the United States for the District of Nevada, entered on February 18, 1950, upon the verdict of the jury (R. Vol. I, p. 47) and from the final decision of such District Court denying plaintiff's motion for new trial entered on June 23, 1950, (R. Vol. I, p. 49). The jurisdiction of the District Court of the United States for the District of Nevada in this action was invoked under Paragraph (a) (1) of Section 1332, Title 28, U.S.C.A. Paragraph I of the Amended Complaint (R. Vol. I, p. 3) alleges that plaintiff is a citizen of the State of Idaho; that defendant Standard Oil Company of California is a corporation incorporated under the laws of the State of Delaware; that the defendant E. J. Odermatt is a citizen of the State of Nevada. Paragraph II of

the Amended Complaint (R. Vol. I, p. 3) alleges that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000. Both defendants in their answers have admitted the allegations of paragraphs I and II of the Amended Complaint (R. Vol. I, pp. 9 & 14). These admissions are also contained in the order on pre-trial conference (R. Vol. I, p. 18). The jurisdiction of this Court is invoked under Section 1291, Title 28, U.S.C.A.

STATEMENT OF THE CASE

This action arose out of a fire which occurred shortly after noon on May 3, 1947, (R. Vol. I, pp. 20 & 21) at a place called Mineral Hot Springs which is located about a mile and a half north of Contact, Nevada, on U. S. Highway No. 93 (R. Vol. I, p. 87).

Mineral Hot Springs was owned and operated on and prior to the day of the fire by the plaintiff Edward Herzinger, a resident of Buhl, Idaho (R. Vol. I, p. 259). It consisted of several buildings, most of which were located adjacent to and on the east side of U. S. Highway 93 (R. Vol. I, p. 87), from which the plaintiff was operating on and prior to May 3, 1947, a bath house, a retail grocery, a bar room, tourist cabins and an automobile service station (R. Vol. I, pp. 87, 92-95).

The petroleum products dispensed by the plaintiff at the automobile service station were products of the defendant Standard Oil Company of California (R. Vol. I, p. 259). These products were delivered to

Mineral Hot Springs by defendant E. J. Odermatt or an employe of defendant E. J. Odermatt (R. Vol. I, p. 20). These deliveries were made from a bulk plant located at Wells, Nevada, and owned by Standard Oil Company of California (R. Vol. I, pp. 76 & 77).

On May 3, 1947, the day of the fire, one Lee Nielson, an employee of defendant E. J. Odermatt, drove a 1942 Ford six-cylinder truck belonging to and being used in the business of defendant E. J. Odermatt from Wells, Nevada, a distance of some 52 miles (R. Vol. II, pp. 401, 404). Upon his arrival at Mineral Hot Springs, Nielson apparently filled a gasoline underground storage tank, the filler pipe of which was located near the door to the building on the premises used as a grocery store and underneath a canopy, which ran to the pumps from which gasoline was dispened at retail (R. Vol. I, pp. 95, 98).

Nielson then moved the truck to the west of the pumps and began filling the second gasoline underground storage tank located on the premises through a filler pipe located on the island between the two retail pumps (R. Vol. II, pp. 413 & 414).

The testimony of one Ross Moseley, who managed Mineral Hot Springs in the absence of the plaintiff, and the testimony of Dale Klitz, who was in the bar room at the time the fire started, was to the effect that Nielson had come into the bar room while the first storage tank was being filled and purchased a soft drink, that he had remained in the bar room

several minutes and then moved the truck to a position from which the second storage tank could be filled and that he then returned to the bar room and that at the time the fire was discovered he was seated on a stool in the middle of the bar room watching a projected picture and listening to music from what was called a Panorama machine, which was a coin operated amusement device which played music and projected a picture on a screen (R. Vol. I, pp. 99-102, 194-196).

Moseley testified that the first indication he had of anything wrong was a flash of fire right under the truck (R. Vol. I, pp. 103 & 104); that he and Nielson, who apparently discovered the fire at about the same time, ran out, reaching the door of the bar room at about the same time (R. Vol. I, p. 104). Klitz, the only other person whose presence on the premises was definitely established, noticed the fire seconds later and also left the bar room by the front door as fast as his legs would carry him (R. Vol. I, pp. 199 & 200). The flames spread rapidly and destroyed most of the buildings on the premises, together with the complete stock of merchandise. (R. Vol. I, pp. 107- 109-111). The replacement cost of the buildings destroyed by fire was shown to be $12,540 (R. Vol. I, pp. 187 & 188); the inventory of goods, wares and merchandise was established at in excess

of $15,767.59 (R. Vol. I, pp. 295 & 296, Plaintiff's Exhibit 11), the furniture and fixtures destroyed were shown to have a value of $10,900 (R. Vol. I, pp. 281-287), and silver and currency destroyed of a value of $1,675 (R. Vol. I, pp. 108 & 293).

At the conclusion of plaintiff's case (R. Vol. II, pp. 399-400) the defendant Standard Oil Company of California moved for a directed verdict on the grounds that the defendant Odermatt was not an agent but was an independent contractor for whose actions the defendant Standard Oil Company of California was not liable. This motion was denied. Both defendants moved for a directed verdict upon the ground that the evidence failed to establish negligence and the proximate cause of the fire. This motion was denied, the Court holding that this was a proper case for the application of the doctrine res ipsa loquitur.

The defendants called the driver of truck, Lee Nielson, who testified on cross-examination in part that he was in the bar room only a matter of seconds while the first storage tank was being filled. He stated, however, that he at that time purchased a bottle of Pepsi-Cola, drank a few swallows of it, and had some conversation with Moseley (R. Vol. II, pp. 440 & 441). He further testified that he did not go into the bar room again until after the delivery of gasoline to the second storage tank had been completed (R. Vol. II, p. 441), that he disconnected the hose lead-

ing from the compartment on the truck to the filler pipe of the second storage tank, drained it and laid it on the ground (R. Vol. II, p. 416) with the nozzle end of the hose still in the filler pipe of the second storage tank (R. Vol. II, p. 432), and that the purpose of going into the bar room the second time was to make out his invoice for the sale of gasoline to the plaintiff (R. Vol. II, p. 416). However, he had not begun to prepare any invoice at the time of the fire; instead he drank some of the Pepsi-Cola, put a coin in the Panorama machine and watched it (R. Vol. II, pp. 420 & 421).

As a part of the defense, one Jacob Ryan qualified as an expert and testified, beginning in the afternoon of Wednesday, February 16, 1950 (R. Vol. II, p. 498). He was asked several hypothetical questions on direct examination (R. Vol. II, pp. 503-509). After cross examination was completed, the witness was asked some additional questions on direct examination. These (R. Vol. II, pp. 522 & 523) are questions calling for an opinion of the witness Ryan based upon his hearing and observation of the testimony already offered. The witness was asked "As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?" An objection was made to the question as follows: "Objected to as not stating facts upon which it is based. It must be a hypothetical question and it does not state any facts at all." The objection was overruled and the witness answered

"I can see no such possibility." (R. Vol. II, pp. 522 & 523.)

At the conclusion of the evidence and argument of counsel, the Court instructed the jury (R. Vol. I, pp. 25-46). The jury retired at approximately 2:30 o'clock P. M. on Friday, February 17. At about 12:30 o'clock A. M., of Saturday, February 18, a note (R. Vol. I, p. 23) was brought to the Court, which was in substance a request by the jury for clarification of Instructions No. 21 and 22. The note itself shows the confusion in the minds of the jury as to the exact effect of the doctrine of res ipsa loquitur as to which party, if either, had the duty of explaining to the jury exactly how the fire started.

The Court, in response to the inqury, called in the jury and instructed them in accordance with Explanation Requested by Jury of Instruction No. 22 (R. Vol. I, pp. 23-25). The plaintiff objected to a portion of this explanation. The jury then again retired and returned with a verdict for the defendants at about 2:30 A. M. on Saturday, February 18.

Judgment was entered on this verdict and a motion for new trial was timely made, argued before the Court on June 23, 1950, and denied by the Court (R. Vol. I, pp. 47-50). Appeal is from the judgment entered on the verdict of the jury on February 18, 1950, and from the order denying plaintiff's motion for new trial entered on June 23, 1950.

SPECIFICATION OF ERRORS

I.

The Court erred in failing to instruct the jury that, "If you find the defendant E. J. Odermatt is not an agent of the defendant Standard Oil Company of California, but the defendant Standard Oil Company of California has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely upon the care or skill of such apparent agent or his assistants, then the defendant Standard Oil Company of California is subject to liability to the plaintiff for harm caused by the lack of care or skill of the defendant E. J. Odermatt or his assistants the same as if the defendant E. J. Odermatt were the agent of the defendant Standard Oil Company of California." As requested by plaintiff in writing (R. Vol. I. p. 220), being designated as "Plaintiff's Instruction No. 1 (Refused)", as shown by proceedings in chambers (R. Vol. II, pp. 536 & 537).

II.

The Court erred in including in its "Explanation Requested by Jury of Instruction No. 22" (R. Vol. I, pp. 23, 24 & 25) the following: "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned." which portion of the explanation was objected to by plaintiff (R. Vol. II, p. 537).

III.

The evidence was insufficient to justify the verdict of the jury in that there was no substantial evidence to show that the defendant, Odermatt or his assistant, in the delivery of gasoline to the plaintiff on May 3, 1947, exercised due care, and in fact, the evidence disclosed as a matter of law that the defendant Odermatt's assistant was negligent in such delivery.

IV.

The Court erred in permitting the witness Jacob A. Ryan, over plaintiff's objection, to testify as follows: (R. Vol. II, pp. 522 & 523).

"Redirect Examination

"By Mr. Platt:

"Q. Mr. Ryan, the cross-examination has suggested another question on redirect examination. From your hearing and observation of the testimony already offered in this case, is it your opinion that there was any outside agency at the time of the fire at or near the truck which caused the fire?

"Mr. Parry: Objected to as not a proper hypothetical question by reference and not proper redirect. I did not go into that on cross-examination.

"The Court: I think counsel asked permission to ask another question on direct.

"Mr. Platt: I did say redirect, but I can call him on direct.

"The Court: Objection overruled. Answer the question.

"A. I saw no evidence indicating there was a source of ignition which the operator of the truck—

"Mr. Parry: I object to that as invading the province of the jury.

"The Court: It is not responsive. Read the question.

"(Question read.) (533)

"Mr. Parry: I renew my objection—

"The Court: Objection will be sustained.

"Q. As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?

"Mr. Parry: Objected to as not stating facts upon which it is based. It must be a hypothetical question and it does not state any facts at all.

"The Court: Objection will be overruled.

"A. I can see no such possibility."

V.

The Court erred in denying plaintiff's motion for new trial, which motion was upon the grounds set forth in numbers I, II, III and IV of the Specification of Errors.

SUMMARY OF ARGUMENT

I.

Plaintiff's Instruction No. 1 (Refused) (R. Vol. 1, p. 22a) is a correct statement of a portion of the substantive law within the issues of the case and should have been given to the jury.

II.

The inclusion in the Court's "Explanation Requested by Jury of Instruction No. 22" (R. Vol. I, pp. 23-25) of the following, "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," was under the circumstances misleading, confusing and prejudicial to plaintiff.

III.

The evidence introduced by the defendants disclosed, as a matter of law, that the assistant of the defendant Odermatt was negligent and the defendants wholly failed to sustain the burden imposed upon them, by the application of the doctrine of res ipsa loquitur, of showing that due care was exercised in the management of the instrumentalities under the control of the defendants.

IV.

Jacob A. Ryan, an expert produced by the defendants, was improperly permitted to state his opinion on one of the fundamental issues in the case

in response to questions which were not hypothetical and did not apprise the jury of the facts upon which the opinion was based.

ARGUMENT

I.

Plaintiff's Instruction No. 1 (Refused), is a correct statement of a portion of the substantive law within the issues of the case and should have been given to the jury.

Appellant's first specification of error is the failure of the Court to instruct the jury that: "If you find the defendant E. J. Odermatt is not an agent of the defendant Standard Oil Company of California, but the defendant Standard Oil Company of California has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely upon the care or skill of such apparent agent or his assistants, then the defendant Standard Oil Company of California is subject to liability to the plaintiff for harm caused by the lack of care or skill of the defendant E. J. Odermatt or his assistants the same as if the defendant E. J. Odermatt were the agent of the defendant Standard Oil Company of California." as requested by plaintiff in writing (R. Vol. I p. 22a), being designated as Plaintiff's Instruction No. 1 (Refused), as shown by proceedings in Chambers (R. Vol. II, pp. 536 & 537).

It is, of course, well settled that it is error for

the trial court to refuse to give an instruction to the jury which contains a correct statement of the law and is applicable to the issues raised in the case. In *Thorwegan vs. King*, (1884) 111 U. S. 549, 28 L. Ed. 514, which was an action to recover damages for deceit, the Supreme Court said, (p. 516):

> "The proposition contained in the request is a correct statement of the law and strictly applicable to the case. The defendant was entitled to have it given to the jury, if not in the precise form asked, at least in substance."

The Federal rule also is stated in *Tex. and P. Ry. Co.* vs. *Rhodes*, 71 Fed. 145 (C.C.A. 5, 1895), an action for damages for personal injuries against the railroad company. In this case the court said (p. 148):

> "Among the rules laid down in repeated decisions of the Federal courts, which relate to the duties of the trial judge to the suitors in the pending case, it is well established that, when a special charge is requested, and the charge recites sound propositions of law, applicable to the material issues of the case, and the special charge, or the substance thereof, has not been covered in the court's charge, the same should be given to the jury."

The Federal rule, as stated above, is supported by the great weight of authority. (64 C. J., Trial, Sec. 714, p. 911, and cases cited).

The error is not cured even if part of the instruc-

tion is given. In *Van Cello* vs. *Clark,* 157 Wash. 321, 289 Pac. 19 (1930), an action for damages resulting from an automobile collision, the court, in reversing the lower court, said (p. 21):

> "This requested instruction embodies a correct statement of the law, and should have been given. The first part of the instruction, to the effect that negligence is never presumed, was given by the court, but this does not preclude appellant from availing himself of the error committed by the trial court in failing to give the balance of the instruction."

It is not open to question that the requested instruction embodies a correct and sound statement of law and was clearly within the issues of the case. (R. Vol. I, pp. 3, 9, 18, 259-262, 301-302, Plaintiff's Exhibits 1, 2, 3, 4 & 10). The principle of law applicable appears in the Restatement of the Law, 1 Agency p. 590, Sec. 267, as follows:

> "One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such."

2 C. J., Agency, Sec. 70, p. 461.

2 C. J. S., Agency, Sec. 29, p. 1063.

2 Am. Jur., Agency, Sec. 104, p. 86.

This statement is quoted with approval in *Montgomery Ward & Co.* vs. *Stevens*, 60 Nev. 358, 109 P. (2d) 895 (1941). This was an action to recover damages alleged to have been sustained by plaintiffs on account of the negligent installation of an automatic burning oil stove. In appealing from a judgment for plaintiffs, the defendant contended that it was not responsible because one Blanchard, who actually installed the stove, was not acting as its servant but as an independent contractor. In affirming, the Supreme Court of Nevada held that plaintiffs were not bound by any agreement between defendant and Blanchard establishing the latter as an independent contractor, since they had no knowledge of the agreement and Blanchard had been held out to them as the agent of the defendant.

Appellant submits that the refusal of the trial court to so instruct the jury, as requested by plaintiff, was clearly reversible error. Appellant is not required to show both error and prejudice unless it *affirmatively* appears from the whole record that the error was not prejudicial. *Lynch* vs. *Oregon Lumber Company*, 108 F. (2d) 283, 286, (C.C.A. 9, 1939); *Pacific Greyhound Lines* vs. *Zane*, 160 F. (2d) 731 (C.C.A. 9, 1947); *McCandless* vs. *United States*, 298 U. S. 342, 347, 80 L. Ed. 1205 (1936).

II.

The inclusion in the Court's "Explanation Requested by Jury of Instruction No. 22" of the following, "Plaintiff's burden of proving negligence and

the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned." was under the circumstances misleading, confusing and prejudicial to plaintiff.

By Instructions 21 (R. Vol. I, pp. 40 & 41) the Court instructed the jury as follows:

> "The mere fact that an accident happened—that the fire happened—considered alone, does not support an inference that some party, or any party, to this action was negligent. The burden is upon the plaintiff in this case to prove by a preponderance of the evidence not only that the driver who delivered the gasoline was negligent in the way he delivered it, but also that his negligence if any was the proximate cause of the fire."

The remaining portion of the instruction defines "proximate cause" and then states:

> "If you do not find the driver was negligent, your verdict should be for the defendants. If he were negligent, but his negligence was not the proximate cause of the fire, your verdict should be for the defendants.
>
> "If the fire did occur due to some cause other than the driver's negligence, then the plaintiff should not recover, whether the driver was negligent or not."

By Instruction 22 (R. Vol. I, pp. 41 & 42) the Court instructed the jury that if it believed that the

plaintiff owned or controlled the underground storage tanks, the appliances in the building including all of the electrical wiring, power plant, oil refrigerator, electric refrigerator, butane water heater, butane stove, motor in panorama machine, motor in juke box, refrigerator, compressor and motor, the plaintiff had the burden to prove by a preponderance of the evidence that the fire was not caused by any of those appliances. The Instruction continued that if the jury found the fire was not caused by any of these appliances and it further found that there was an accidental occurrence as claimed by the plaintiff, namely: That shortly after noon on the 3rd day of May, 1947, the defendant E. J. Odermatt, through an assistant, was delivering gasoline to the plaintiff and that said gasoline became ignited and flames spread to buildings owned by the plaintiff destroying them; and if it should find that from the accidental event, as a proximate result thereof, plaintiff has suffered damages the jury was instructed as follows:

> "An inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant E. J. Odermatt or his assistant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome

> that inference, bearing in mind that it is incumbent upon the defendant E. J. Odermatt, to rebut the inference by showing that he or his assistant did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on his part or on the part of his assistant."

After deliberating some ten hours the foreman of the jury sent a note to the Court (R. Vol. I, p. 23) which read as follows:

> "Your Honor Judge Foley: The jury cannot interpret the Instruction No. 22 with reference to inference which seems to be somewhat vague as our position as to the form of evidence and the burden upon the plaintiff or the defendant. " 'The proximate cause of an event is distinguished from a remote cause* * *. (Instruction 21) 'If you do not find the driver was negligent, your verdict should be for the defendants. If he were negligent, but his negligence was not the proximate cause of the fire, etc. (Inst. 21).' An interpretation would.
>
> /s/ Russell Mills,
> Foreman"

It would thus seem that having read the instructions of the Court carefully the members of the jury were confused by the apparent contradiction between Instruction 21 and 22 with reference to the

inference which arose or did not arise from the happening of the accident and which should have been made available to the plaintiff by the Court's ruling that the doctrine of res ipsa loquitor applied and particularly the jury was desirous of knowing whether someone had the duty to tell them exactly how the fire started and if so, which of the parties had this burden.

In response to this note an explanation was given to the jury which after explaining the first part of Instruction 22 stated as follows (R. Vol. I, pp. 23-25):

> "That an inference then arises that the proximate cause of the fire was some negligent conduct on the part of the defendant Odermatt, or his assistant. That inference is a form of evidence. If you do not find any evidence contrary to the inference, the inference would support a verdict for the plaintiff. If there is evidence contrary to the inference, such inference and the contrary evidence must be weighed, having in mind that it is not necessary for the defendant to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference must have greater weight, more convincing force in the mind of the jury

> than the opposing explanation offered by the defendant."

The confusion in the minds of the jury resulting in its request to the Court for further explanation of Instructions No. 21 and 22 is easily understandable. The two instructions are of themselves confusing. Instruction 21 is a standard instruction in negligence actions and begins by stating in effect that no inference that some party or any party to the action was negligent is to be drawn from the mere fact that an accident happened. Instruction 22, based upon the doctrine of res ipsa loquitur which the trial Court properly held was applicable to the circumstances involved, is in its very essence contradictory to Instruction 21. This is true because if the doctrine of res ipsa loquitur applies to a circumstance, then an inference or a presumption does arise from the mere fact that the particular accident happened. This inference or presumption is that the accident would not have happened except for some negligent conduct on the part of the defendant, or, in this case, the assistant of the defendant Odermatt. This confusion was recognized in the case of *Oettinger* vs. *Stewart* (Cal. 1943, 137 P. (2d) 852, p. 856) in that the giving of instructions remarkably similar to Instructions No. 21 and 22 was held reversible error. A similar holding is contained in the opinion of the California Supreme Court in the case of *Brown* vs. *George Pepperdine Foundation* (1943), 23 Cal. (2d) 256, 143 P. (2d) 929, 931.

It is conceded that the plaintiff did not object to the giving of Instructions No. 21 and 22. However, the plaintiff did object to the inclusion in the Court's Explanation Requested by Jury of Instruction No. 22 of the words "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned." Inasmuch as the plaintiff did object to this portion of the explanation, there was in effect an objection to Instructions No. 21 and 22 as amended by the Explanation which should entitle the plaintiff to urge the giving of Instructions No. 21 and 22 as error. The objection of the plaintiff was an attempt to avoid the same confusion in the minds of the jury recognized in the cases just above cited. In *Oettinger* vs. *Stewart*, just cited, the trial court gave also the following instruction (137 p. (2d) 856):

> " 'If, after considering all of the evidence you find that the accident might have been caused in several different ways, and you further cannot determine what was the proximate cause of the accident which caused plaintiff's injuries, then your verdict must be for the defendants.' "

In commenting on this instruction, the California Court stated:

> "This instruction placed upon the plaintiff the duty of proving the cause of defendant's falling, and directed a finding in favor of defendants even in the event that defendant May Stewart

> failed to explain or excuse her actions. It nullified the instruction on res ipsa loquitur and was prejudicially erroneous."

It is also conceded that the trial court in this case did not give an instruction identical with the quoted instruction from the case of *Oettinger* vs. *Stewart.* However, it is plaintiff's position that the inclusion of the words which were objected to by the plaintiff (R. Vol. II, p. 537) in effect nullified the instruction on res ipsa loquitur and was prejudicially erroneous, and we think this is true even though as an abstract statement of the law of res ipsa loquitur it were conceded, for the purpose of this argument, that the words were correct.

The circumstances under which the explanation of the Court was given clearly show that the jury must have carefully read and considered the instructions of the court and had found that none of the instrumentalities under the control of the plaintiff had caused the fire, otherwise they would not have been concerned with the inference and the burden upon the plaintiff or the defendant. The Jury's Request for Explanation of Instruction No. 22 (R. Vol. I, p. 23) also clearly shows that the jury was concerned over the proximate cause of the fire. The most reasonable analysis of the situation is that the question in the minds of the jury was whether either party to the action had the duty under the law to explain exactly what caused the fire. The words which were objected to by the plaintiff were

taken from California Jury Instructions, Civil, Third Revised Edition, 206 (d). The pertinent portion of that instruction reads as follows:

> "Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned."

At the defendants' request and over objection by the plaintiff, that sentence was changed to read as follows:

> "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned."

The insertion of the words "and the proximate cause of the fire", in view of the nature of the inquiry from the jury, nullified the benefits of the doctrine of res ipsa loquitur which the Court had properly ruled was applicable to the circumstances involved.

We are not here contending that the burden of proof shifts to the defendant upon the application of the doctrine of res ipsa loquitor. We do urge, however, that it is the rule under the great weight of authority that the application of the doctrine of res ipsa loquitur does result in a shifting of the burden of going forward with the proof. (38 Am. Jur., Negligence, Sec. 311, p. 1007). Since this is true, it is an alteration in the plaintiff's burden in some respects. In a case such as this, where the doctrine of res ipsa loquitur is properly applicable, the plaintiff

need only prove that the accident happened as he claimed it did; that the accident was one which in the ordinary course of events did not happen; and that no instrumentality under his control was the cause of the accident. When this is done, a burden is placed upon the defendant to either (1) satisfactorily explain the accident by showing a definite cause, in which cause there is no element of negligence on the part of the defendant, or (2) that the defendant (or in this case, an employee of the defendnat) so controlled and operated the instrumentalities under his control in all possible respects as necessary to lead to the conclusion that the accident could not have happened from want of care. (*Diermen* vs. *Providence Hospital, et al*, 1947, 31 Cal. (2d) 290, 188 P. (2d) 12, p. 15; *Druzanich* vs. *Criley, et al*, (1942), 19 Cal. (2d) 439, 122 P. (2d) 53; *Williams* vs. *Field Transportation Company, et al*, (D.C.A. 2d Dist., Cal. 1946), 166 P. (2d) 884, 887)

It is therefore believed that the trial court, having given to the jury Instruction No. 21 and No. 22 and having received the inquiry it did from the jury, was in error in stating to the jury (and it can only be concluded that the court was referring to Instruction No. 21) that there was no change in the plaintiff's burden of proving negligence and the proximate cause of the fire as a result of the application of the doctrine of res ipsa loquitur.

The word "change" used as an intransitive verb is defined by Webster's International Dictionary

as meaning "to be altered; to undergo variation; to alter; to vary; as, men sometimes *change* for the better." To say that the plaintiff's burden of proving negligence and the proximate cause of the fire is not changed by the application of the doctrine of res ipsa loquitur is incorrect, since the plaintiff's burden is altered or varied to a degree by the application of the doctrine. That there is unquestionably an alteration, or variation, in the plaintiff's burden of proof in a res ipsa loquitur case is demonstrated by the cases cited above and under part III of this argument.

We submit that the Court committed prejudicial error in including in his explanation to the jury the words objected to by plaintiff. It cannot be denied that Instructions No. 21 and 22 were contradictory and confusing. The jury itself said so. The so-called Explanation simply added to the confusion and was erroneous in itself.

III.

The evidence introduced by the defendants disclosed, as a matter of law, that the assistant of the defendant Odermatt was negligent and the defendants wholly failed to sustain the burden imposed upon them, by the application of the doctrine of res ipsa loquitur, of showing that due care was exercised in the management of the instrumentalities under the control of the defendant.

Assuming, as it is believed proper in view of the wording of the note sent to the Court by the jury (R.

Vol. I, p. 23), that the jury had found that none of the instrumentalities under the control of the plaintiff caused the fire and that an accident did occur as claimed by the plaintiff, it must be concluded that the plaintiff is entitled to the benefit of the inference or presumption that the proximate cause of the occurrence was some negligent conduct on the part of the defendant E. J. Odermatt or his assistant.

Under Instruction No. 22 (R. Vol. I, p. 42), it was incumbant upon the defendant to rebut the inference or presumption by showing that the defendant E. J. Odermatt or his assistant did in fact exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure on his part or on the part of his assistant.

The evidence introduced by the defendants at the trial did not rebut the inference or presumption. It did not show that E. J. Odermatt's assistant did exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on his part or on the part of his assistant. On the contrary, the testimony of the driver of the truck, Lee Nielson, (R. Vol. II, pp. 400-446), when coupled with the testimony of the expert Jacob Ryan (R. Vol. II, pp. 498-524), clearly showed that the driver's actions both while and after delivery of gasoline to the plaintiff's tanks were negligent and in violation of standard safety rules. The testimony of Nielson shows that he left the truck while gasoline was being delivered to the plaintiff's

tanks (R. Vol. II, p. 440) which was in violation of an accepted safety rule as testified to by the witness Ryan (R. Vol. II, p. 520). There is no testimony to indicate that Nielson made any determination that there were no sources of ignition present during the delivery of gasoline to the premises of the plaintiff, which, according to the testimony of the witness Ryan (R. Vol. II, p. 520), was the employee's responsibility under an accepted safety rule. Nielson testified that when the delivery was completed in the second underground storage tank that he disconnected the hose from the tank on the truck, drained it, laid it down on the ground leaving the other end still in the filler pipe and then went into the bar room on the plaintiff's premises to make out his invoice (R. Vol. II, pp. 416, 431, 432). Why the hose was not placed on the truck and the cap placed on the filler pipe as was done by Nielson following the filling of the first underground tank (R. Vol. II, p. 440), was not shown and we submit that it is most logical to believe that if the nozzle of the hose was still in the filler pipe to the underground tank, that gasoline was being delivered through the hose at the time the fire began. However, assuming that Nielson's testimony is true, his actions were obvioualy negligent.

As has been stated, it is not the plaintiff's position that the application of the doctrine of res ipsa loquitur results in a shifting of the burden of proof to the defendant; however, it is the plaintiff's posi-

tion that the application of the doctrine of res ipsa loquitur does place a burden upon the defendant and that that burden has been properly defined by the Supreme Court of the State of California in the case of *Dierman* vs. *Providence Hospital, et al,* (1947), 31 Cal. (2d) 290, 188 P. (2d) 12, p. 15:

> "The general principle is, as stated by this court in 1919 (in denying a hearing in Bourguignon v. Peninsular Ry. Co., 40 Cal. App. 689, 694, 695, 181 P. 669, 671) 'that, where the accident is of such a character that it speaks for itself, as it did in this case, * * * the defendant will not be held blameless, except upon a showing either (1) of satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented.' "

In that case the court held that the defendant had not met either of the duties above stated, and that a judgment rendered for the defendant should be re-

versed and the cause remanded for a new trial.

A similar holding upon similar grounds again by the Supreme Court of California is in the case of *Druzanich* vs. *Criley, et al* (1942) 19 Cal. (2d) 439, 122 P. (2d) 53, wherein the court stated (p. 56):

> "However, the trier of fact cannot arbitrarily disregard the inference. As stated in Ales v. Ryan, 8 Cal. 2d 82, 99, 64 P. 2d 409, 417: 'The rule is well settled by a multitude of decisions of the appellate courts of this state to the effect that the inference of negligence which is created by the rule res ipsa loquitur is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff. It is incumbent on the defendant to rebut the prima facie case so created by showing that he used the care required of him under the circumstances. The burden is cast upon the defendant to meet or overcome the prima facie case made against him.' "

To a similar effect is the language in the case of *Williams* vs. *Field Transportation Company, et al,* (D.C.A. 2d Dist., Cal. 1946), 166 P. (2d) 884, 887:

> "Where in an action for personal injuries only general negligence is alleged and the instrumentality which caused the injury was under the exclusive control of defendant and the accident is of the variety that does not occur in the

> ordinary course of events if proper care by the defendant has been exercised, the doctrine of res ipsa loquitur applies; and unless defendant so explains the accident as to rebut the inference of his negligence plaintiff is entitled to recover. And that the defendant does not know the cause is no explanation. Ireland v. Marsden, 108 Cal. App. 632, 643, 291 P. 912; Cooper v. Quandt, 105 Cal. App. 506, 508, 288 P. 79; Druzanich v. Criley, 19 Cal. 2d 439, 444, 122 P. 2d 53."

To a similar effect is the case of *Fiske, et al*, vs. *Wilkie*, (1945) 67 Cal. App. (2d) 440, 154 P. (2d) 725, 729.

In the instant case, the jury was not entitled to disregard the inference or presumption in view of the fact that the evidence introduced by the defendant showed as a matter of law that the defendant E. J. Odermatt's assistant was negligent in the delivery of the gasoline to the underground storage tanks of the plaintiff. This is particularly true, since the Jury's Request for Explanation of Instruction No. 22 (R. Vol. I, p. 23), when read in the light of Instruction No. 22 (R. Vol. I, pp. 41-42), shows clearly that the jury had determined that none of the instrumentalities under plaintiff's control caused the fire and that the fire occurred as claimed by the plaintiff.

IV.

Jacob A. Ryan, an expert produced by the defendants, was improperly permitted to state his opinion

on one of the fundamental issues in the case in response to questions which were not hypothetical and did not apprise the jury of the facts upon which the opinion was based.

As a final witness, the defendants called the only expert who testified at the trial. The witness chosen for this high light of the trial from the many who must have been available to the defendants was Jacob A. Ryan.

It appears in the record (Vol. II, pages 498, 499, 505 and 506) that Mr. Ryan represented himself to the jury as exceedingly well qualified. He stated that he was a research engineer by profession being a graduate civil engineer. For about 10 years after his graduation, he engaged in construction work, and in 1920 was employed by Standard Oil Company where, after only a few weeks, he became engaged in testing work, which work consisted of testing how processes are operating where there are temperatures, pressure, heat flows, vapors, and so forth.

His work included fire prevention and hazards. As early as the middle 1920's, he supervised a great many tests designed to learn how fires may be started, the flow of vapors, velocity, the composition of vapors that are involved in gasoline and other petroleum products, storage tanks and so forth. This work was carried on quite extensively by him for three to five years. He had for thirty years been employed by Standard Oil Company of California or one of its subsidiaries and all that time engaged

in the professional activities and was from time to time called on for consultation in connection with fire prevention and fire hazards.

He was established before the jury as the man who knew the answers to all of the questions relating to fire, its causes and its prevention.

With this build-up, he was permitted to express an opinion upon one of the most fundamental questions involved in this case, without the facts, upon which such an opinion could be based, being incorporated into the question which elicited the opinion.

It is felt that the admission of the testimony of the witness Jacob A. Ryan (R. Vol. II, pp. 522 & 523) was clearly prejudicial error. This testimony is as follows:

"Redirect Examination

"By Mr. Platt:

"Q. Mr. Ryan, the cross-examination has suggested another question on redirect examination. From your hearing and observation of the testimony already offered in this case, is it your opinion that there was any outside agency at the time of the fire at or near the truck which caused the fire?

"Mr. Parry: Objected to as not a proper hypothetical question by reference and not proper redirect. I did not go into that on cross-examination.

"The Court: I think counsel asked permission to ask another question on direct.

"Mr. Platt: I did say redirect, but I can call him on direct.

"The Court: Objection overruled. Answer the question.

"A. I saw no evidence indicating there was a source of ignition which the operator of the truck - - -

"Mr. Parry: I object to that as invading the province of the jury.

"The Court: It is not responsive. Read the question.

(Question read)

"Mr. Parry: I renew my objection—

"The Court: Objection will be sustained.

"Q. As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?

"Mr. Parry: Objected to as not stating facts upon which it is based. It must be a hypothetical question and it does not state any facts at all.

"The Court: Objection will be overruled.

"A. I can see no such possibility."

By his last answer the witness was permitted to and did give a positive answer to one of the fundamental issues in the case and he was permitted to do this in

response to a question which was not hypothetical and which stated no facts and which was based upon his hearing and observation of the testimony previously offered in the case.

It is true that on the witness' direct examination, occurring on the previous day, the witness was asked hypothetical questions; however, the testimony above quoted from the record conclusively shows that his opinion was not called for upon the facts enumerated in any previous hypothetical question but upon his hearing and observation of the testimony already offered in the case.

Almost without exception the authorities agree that the better if not the only proper method of eliciting the opinion of an expert witness is by means of a hypothetical question setting forth the facts established by the evidence in the case. This rule is well founded in reason as is stated by the Oregon Supreme Court in *Lippold* v. *Kidd* (1928), 126 Ore. 160, 269 Pac. 210, 59 A.L.R. 875, beginning at page 211 of the Pacific Reporter:

> "'As an expert is not allowed to draw inferences or conclusions of fact from the evidence, his opinion should be exact upon a hypothetical statement of fact. It is the privilege of counsel to assume any state of facts which there is any testimony tending to prove, and to have the opinion of the expert based on the facts assumed. * * *'

> "Sound reason is the foundation for this requirement that the facts should be stated to the witness hypothetically. The expert witness is granted the privilege of expressing to the jury an opinion because his superior training enables him to arrive at a conclusion which is more likely to be sound than that of the average juror. But all opinions are based upon facts; generally the recipient of an opinion is at a loss to know what use he may advisedly make of an expert's opinion, unless he also knows what facts the expert took for granted when he formulated his conclusion. And it is equally necessary to the expert that, before he is required to express an opinion, he should be supplied with the necessary data. We see this exemplified in the daily affairs of life: A building contractor cannot safely submit a bid without detailed plans and specifications, and his bid is worthless to an owner, unless plans and specifications give the owner a detailed impression of the contemplated structure. The hypothetical question serves to the court and the jury the purpose of the plans and specifications."

The Idaho Supreme Court is in agreement as is shown by the following language in *Evans* vs. *Cavanagh* (1937), 58 Ida. 324, 73 P. (2d) 83, 85:

> "There is little or no conflict in the evidence other than in the testimony of medical experts.

The testimony of an expert as to his opinion is not evidence of a fact in dispute, but is advisory, only, to assist the triers of fact to understand and apply the testimony of other witnesses. Its value depends on, among other things, the expert confining himself in his testimony to the facts incorporated in the question propounded to him, and if he does not assume these facts to be true and base his answer on them, his testimony is worthless and should be rejected. It is for the triers of fact to determine whether the evidence on which the expert bases his opinion is true or not. It is not for the expert to assume the responsibility of determining the truth or falsity—the reliability or unreliability, of the testimony of other witnesses. For this reason he should not be asked to base his opinion on the testimony of other witnesses which he has heard, but the facts which that testimony tends to establish, and which is relied on by the party propounding the question, should be hypothetically stated, and the testimony of the expert should be responsive to that question, and it is his duty to assume those facts to be true. Cochran v. Gritman, 34 Idaho 654, 203 P. 289; People v. McElvaine, 121 N.Y. 250, 24 N.E. 465, 466, 18 Am. St. Rep. 820; Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73."

Wigmore on Evidence, Third Edition (1940), Volume II, Section 672, page 792, states the accord

of that author with the general rule. Authorities on the point are legion; however, it is believed unnecessary to burden the Court with further references.

In some cases an expert witness has been permitted to give an opinion based upon the testimony of another witness or of several witnesses; however, even where that has been permitted, the rule has been limited to cases in which the testimony is brief, uncomplicated and not conflicting. The relaxation of the broad general rule is stated in 20 Am. Jur. Evidence, Section 789, page 662:

> "No. 789. *Testimony Overheard by Expert.*
>
> "The courts are not in accord upon the question of the right of an expert witness having no personal knowledge of the facts to give an opinion based upon the testimony of other witnesses which the expert has heard given. It is undoubtedly the better practice in such cases to incorporate in a hypothetical question the facts on which an expert witness is asked to give an opinion. Many statements are to be found which suggest that as a broad general rule, an expert cannot be allowed to base his opinion on the evidence which he has heard given in the case. According to the weight of authority, however, it is within the discretion of the trial court to permit an expert witness to give an opinion based upon the assumption of the truth of testimony which he has heard given by other wit-

> nesses without a hypothetical statement of the facts, where the witnesses are few, and the testimony is not voluminous, complicated, or conflicting. *In such cases, the question should be so framed that the jury will understand the exact facts upon which the witness bases his opinion.* It has been said that where testimony is brief and simple and especially where there is no contradictory evidence, to ask the expert to state his opinion, assuming the evidence given to be true, is equivalent to embodying the evidence in a hypothetical question." (Emphasis added).

Evidence in this case was introduced over a period of some eight days. It is believed safe to say that the evidence was complicated and in many instances conflicting.

Even in those jurisdictions and in those instances where experts have been permitted to give an opinion based upon the testimony or certain testimony in a case, almost universally, in addition to the requirement that the testimony be brief and uncontradicted, the courts have laid down these additional qualifications: (1) As is stated in 82 A.L.R. 1468:

> "With but few exceptions it has been held that where the opinion of an expert is asked on facts not detailed in the question itself, but the witness is referred to the testimony of another for such facts, *it should appear that the witness has heard the testimony.*" (Emphasis added).

and (2) The expert witness must be required by the question asked to assume the truth of the evidence (82 A.L.R. 1471).

It was not established that the witness Ryan was present and heard all or any part of the testimony in this case; also the witness was not required to assume as true all or any part of the testimony given. The witness was merely asked: "From your hearing and observation of the testimony already offered in this case, * * * ." This type of question points up the vice of deviating from the general rule and the recognized better practice. Here the witness, whether or not he was present and heard the testimony, and without being required to assume the truth of any testimony, was permitted to do that which in our judicial system is reserved to the triers of fact, that is, he was permitted to accept or reject all or any part of the testimony of any witness and he was permitted to draw his own inferences from some or any of the facts testified to by one or more of the witnesses; and, finally, he was permitted to express his positive and unqualified opinion on the fundamental and basic question in the entire case; namely, did the fire "emanate in or about the truck."

The admission of such testimony from any witness would be damaging, and it was particularly damaging and prejudicial when the circumstances are considered. This witness was the only expert who testified at the entire trial, his related experience and education held him out to be eminently

qualified. The jury was composed of the type of individuals, who in their business and personal living undoubtedly call upon, receive and rely upon the opinions of experts in their field, including civil engineers. It is difficult to imagine a conclusion of the defendants' case which could be more prejudicial to the plaintiff than the unequivocal statement made by the witness Ryan (when asked, "As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?"), "I can see no such possibility."

That the particular answer given was highly prejudicial to the plaintiff is borne out by the fact that, from the jury's note to the trial Court, it is apparent that the jury was particularly concerned over the proximate cause of the fire and who had the duty of explaining the exact cause. The witness was permitted to say in substance that he could see no possibility of a fire emanating in or about the truck without some outside agency, light or fire—the very issue which caused the jury so much concern. The admission of this testimony constitutes reversible error.

CONCLUSION

For the reasons stated, we submit that the trial Court should have granted plaintiff's motion for new trial and that the judgment and order appealed

from should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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